1988

Salt Lake City v. Jeff Nelson : Brief of Appellant

Utah Court of Appeals

David P.S. Mack; Salt Lake Legal Defenders Association; Attorney for Appellant.
John Johnson; Salt Lake City Prosecutor; Attorney for Respondent.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

SALT LAKE CITY,	:	BRIEF OF APPELLANT
Plaintiff-Respondent,	:	
v.	:	
JEFF NELSON,	:	Case No. 880416-CA Priority #2
Defendant-Appellant.		

BRIEF OF APPELLANT

Appeal from a conviction and judgment for one count each of Battery and Destruction of Property in the Third (then Fifth) Circuit Court, in and for Salt Lake County, State of Utah, the Honorable Floyd H. Gowans, judge, presiding.

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STATEMENT OF ISSUE

Did the trial court err reversibly in rejecting defendant's request to have the jury instructed on his theory of the case where evidence was presented which supported such theory?

TEXT OF STATUTE

UTAH CODE ANN. §76-5-104 (1953 as amended) CONSENSUAL ALTERCATION NO DEFENSE TO HOMICIDE OR ASSAULT IF DEADLY WEAPON USED.

In any prosecution for criminal homicide under part 2 of this chapter or assault, it shall be no defense to the prosecution that the defendant was a party to any duel, mutual combat, or other consensual altercation, if during the course of the duel, combat, or altercation, any deadly weapon was used.

JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this court pursuant to Utah Code Annotated, Section 78-2a-3(2) (c) (1953 as amended), and Utah Code Annotated Section 77-35-26(b) (1) (1953 as amended), whereby a defendant in a criminal action may take an appeal to the Court of Appeals from a final judgment of conviction of a Class B misdemeanor. In this case, final judgment and conviction was rendered by the Honorable Judge Floyd H. Gowans, Third Circuit Court, Salt Lake County, Utah on April 27, 1988.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

SALT LAKE CITY,	:	
Plaintiff-Respondent,	:	
v.	:	
JEFF NELSON,	:	Case No. 880416-CA Priority #2
Defendant-Appellant.		

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an appeal from a judgment against Jeff Nelson for one count of Battery, a Class B misdemeanor. A jury found Mr. Nelson guilty of one count each of Battery and Destruction of Property at the conclusion of a one-day trial on April 27, 1988. On that same date, Mr. Nelson was sentenced to serve 180 days in the Salt Lake County jail on each count, sentences to run concurrently with each other and concurrent with the time Mr. Nelson was then serving in the Utah State Prison, provided restitution was made within one year after his release from the prison. This sentence was imposed in the Third Circuit Court in and for Salt Lake County, State of Utah, by the Honorable Floyd H. Gowans, judge.

STATEMENT OF FACTS

On the evening of November 5, 1987, Jeff Nelson was present in the apartment of Melissa Fonnesbeck at 1123 East 900 South, Salt Lake City, Utah (T. 32). Until about a week before, the two had lived together for ten months, sharing an apartment in Bountiful, Utah (T. 28, 29).

Soon after Mr. Nelson's arrival at Ms. Fonnesbeck's on November 5th, Shawn Carlisle, a person believed by Appellant to be Ms. Fonnesbeck's new boyfriend, knocked on the door.

There is no contradictory evidence in the record up to this point; however, the facts regarding the remainder of the incident are disputed.

Mr. Nelson testified that he argued with Mr. Carlisle at the door and outside Ms. Fonnesbeck's apartment and that Mr. Carlisle left the area (T. 121). Mr. Nelson further stated that Ms. Fonnesbeck also came outside and began yelling at him while standing in the rain clad only in a robe (T. 122). He tried to get her to go back inside and she refused, so he picked her up over his shoulder and carried her in while she struggled, kicking and hitting him on his back (T. 122).

Back inside, the argument continued. In the course of things, Mr. Nelson slapped Ms. Fonnesbeck, rebreaking her nose, which had been broken earlier that summer in a car accident (T. 123, 39).

The version of the facts reported by Ms. Fonnesbeck and Mr. Carlisle on behalf of the City from the time of Mr. Carlisle's arrival at the apartment diverges from the account given by Mr. Nelson.

Mr. Carlisle testified that he was met at the door by Mr. Nelson, who then burst out pushing and yelling at Mr. Carlisle, uttering threats and warning him to stay away from Ms. Fonnesbeck (T. 16, 19).

Ms. Fonnesbeck testified that she opened the door a little bit and that Mr. Nelson ran up the stairs to the door and hit Mr. Carlisle and chased him down the driveway shouting threats (T. 33). She also stated that after the confrontation between Mr. Nelson and Mr. Carlisle, Mr. Nelson returned to the apartment and began throwing things around (T. 33). As this was happening, she ran outside and down the driveway in order to get the upstairs neighbor to call the police. She stated that Mr. Nelson then came out, ran down the driveway, grabbed her by the hair, and dragged her the length of the driveway back to the apartment, down the stairs through the apartment and to the bedroom (T. 34). Mr. Nelson then allegedly turned off the light, pinned Ms. Fonnesbeck on the bed, and choked and hit her (T. 35). Ms. Fonnesbeck testified that she was then dragged to the bathroom. At that point the police came to the door to investigate the situation (T. 37). Jeff Nelson was charged by information on March 18, 1988 with Battery and Destruction of Property. (See Addendum A).

Salt Lake City Police officer Craig Young testified that he reported to a call on November 5th, 1987 at Ms. Fonnesbeck's address and that there was a continuing argument in his presence between Jeff Nelson and Melissa Fonnesbeck. Officer Young testified that Ms. Fonnesbeck was bleeding from her nose (T. 77, 78). Officer Young also stated that it was his impression that both Mr. Nelson

and Ms. Fonnesbeck had engaged in the altercation (T. 81, 82, 86), and that the typical family fight involves both the male and the female (T. 83).

After the presentation of evidence by the defense, the court met with respective counsel in chambers to discuss jury instructions. Defendant, through counsel, requested the inclusion of an instruction which stated that mutual combat or consensual altercation could be considered as a defense to the battery charge. (See Addendum B).

The court rejected this proposed instruction, stating that there was no evidence to support it. Defendant reserved the objection at the court's request and placed it on the record at the conclusion of the jury's deliberations (T. 148, 149). Because the court found that there was no basis in the evidence for an instruction of this type, discussion of the correct wording of such an instruction was foreclosed.

The jury convicted Jeff Nelson of Battery and Destruction of Property, both Class B misdemeanors. On the same date, April 27, 1988, the Honorable Floyd H. Gowans, Judge in the Third Circuit Court, imposed sentence on Mr. Nelson.

SUMMARY OF ARGUMENT

Appellant urges this Court to overturn his conviction of the Battery charge. Appellant contends that the trial court erred reversibly in not allowing the inclusion of a jury instruction supportive of Defendant's theory of the case when such theory had basis in the evidence presented at trial.

ARGUMENT

POINT I

JEFF NELSON'S CONVICTION OF BATTERY SHOULD BE REVERSED BECAUSE THE TRIAL COURT ERRED IN REJECTING DEFENDANT'S REQUEST TO HAVE THE JURY INSTRUCTED ON HIS THEORY OF THE CASE WHERE EVIDENCE WAS PRESENTED WHICH SUPPORTED THIS THEORY.

Jeff Nelson was convicted on April 27, 1988, of the crimes of Battery and Destruction of Property. Mr. Nelson contends that the trial court erred reversibly in rejecting his proposed jury instruction setting forth his defense. The Court refused to give this requested instruction on the grounds that there was no factual basis for it. This error was prejudicial and requires reversal of the Battery conviction on appeal.

Mr. Nelson prepared and submitted to the trial court proposed jury instructions. Inter alia, Mr. Nelson requested the inclusion of an instruction regarding mutual combat or consensual altercation as a defense to prosecution for Battery. This proposed instruction set forth the law as follows:

> If the evidence shows beyond a reasonable doubt that Jeff Nelson was a party to any duel, mutual combat, or other consensual altercation, then you must find the defendant not guilty. (See Addendum B).

Before the trial court instructed the jury, the court and respective counsel discussed proposed instructions in chambers and off the record. The court refused to give this instruction, stating there was no evidentiary basis other than the statement of Defendant

which would support such a theory. Defense counsel reserved an objection on the record at the conclusion of the trial after the verdict was rendered (T. 149). The court noted the objection but gave no reason on the record of its reasons for rejecting the requested instruction. The court erred reversibly in not submitting Defendant's proposed instruction on mutual combat. The instruction was unchallenged by either the prosecution or the court as a proper statement of the law. Contrary to the court's assertion, the instruction was supported by the evidence given at the trial. The impact of the court's refusal to instruct was indisputably prejudicial.

The legitimacy of the defense instruction on mutual combat as an instruction was unchallenged at trial by either prosecution or the court. The language of the instruction is taken from Utah Code Ann. §76-5-104 (1953 as amended), which states that duel, mutual combat or other consensual altercation may not be used as a defense to prosecution for homicide or assault if during the course of the duel, combat, or altercation any deadly weapon was used. This statute does not prohibit the raising of mutual combat or consensual aggression as a defense generally, but only when the party attempting to raise it used a weapon. It logically follows that when no weapon is used, mutual combat or other consensual aggression are defenses to battery. This defense is commonly raised. Its legitimacy, not having been raised at trial, is not at issue here.

The two questions before this Court are whether the mutual altercation instruction had a factual basis in the case at bar and whether the trial court's refusal to give the instruction constitutes reversible error.

The Utah Supreme Court has in numerous cases stated that each party in a criminal case is entitled to have the jury instructed on the law applicable to its theory of the case if there is any reasonable basis in the evidence to justify it. In State v. Castillo, 457 P.2d 618 (Utah 1969), the trial court's refusal to give defendant's requested self defense instructions was upheld. Defendant admitted at trial to entering his former wife's dwelling armed with a knife in anticipation of trouble, although his sole ground for apprehension was his observation of a stick under a couch on a previous occasion. The court held that defendant did not present substantial evidence to support his theory of the case. The court stated the guidelines as follows:

> If the defendant's evidence, although in material conflict with the State's proof, be such that the jury may entertain a reasonable doubt as to whether or not he acted in self-defense, he is entitled to have the jury instructed fully and clearly on the law of self-defense. Conversely, if all reasonable men must conclude that the evidence is so slight as to be incapable of raising a reasonable doubt in the jury's mind as to whether a defendant accused of a crime acted in self-defense, tendered instructions thereon are properly refused. Castillo, at 620.

The Utah Supreme Court has elucidated the standard for determining whether proposed defense theory of the case jury instructions should be given in other cases. In State v. Torres, 619 P.2d 694 (Utah 1980), the court reversed appellant's conviction of aggravated assault. The facts of the case from the State's standpoint were established primarily through the testimony of a Salt Lake City police officer. He testified that he broke up a

fight, then gave chase to one of the participants. He testified that this individual (the accused) challenged him, kicked him, threw him to the ground and struck him with a nightstick. The accused testified that when he attempted to surrender, the officer struck him with a nightstick. He pushed the officer down, then grabbed the nightstick and struck him when the officer went for his gun.

The Torres decision is illuminating in the matter at hand. In Torres, as in Mr. Nelson's case, the primary evidence of the defense theory of the case was testified to by the defendant. Officer Young's testimony was somewhat corroborative of Mr. Nelson's statements as to the mutuality of the altercation; in the Torres case, defendant's version of the facts was completely uncorroborated. Nevertheless, the Supreme Court found that the trial court acted properly in giving an instruction on the theory of self defense based soley on the testimony of the accused.

The Supreme Court reversed the conviction in Torres because the trial court erred in refusing to give defendant's requested jury instruction stating that the defendant did not have the burden of persuasion in relation to this theory of self defense. The Court explained:

> We are not concerned with the reasonableness, nor the credibility of the defendant's evidence relating to his claim of self defense. Each party is, however, entitled to have the jury instructed on the law applicable to its theory of the case if there is any reasonable basis in the evidence to justify it. Torres at 695.

In State v. Brown, 607 P.2d 261 (Utah 1980) the Utah Supreme Court held that the trial court's refusal to instruct on self defense was proper. In Brown, the defendant was found guilty of killing his victim for the purpose of preventing him from testifying. In his defense defendant raised the theories of intoxication and self defense. The Court held that although defendant is entitled to have the jury instructed on his theory of the crime if there is any basis in evidence to support it, in this case it could not find any credible evidence that the defendant was justified in using deadly force or any reasonable belief that he was in danger. Consequently the instructions were properly refused.

The facts in Brown are distinguishable from the facts in the case at bar. In Brown, there was no testimony offered by defendant or anyone else to show that his victim ever assumed the role of aggressor. Brown, at 255, 256. In Mr. Nelson's case, on the contrary, there are facts in evidence supporting defendant's theory of the case.

Based on the holdings in these cases, it is clear that a defendant's requested theory of the case instruction must be given by the court when it has a factual basis. See also State v. Potter, 627 P.2d 75 (Utah 1981) and State v. Smith, 706 P.2d 1052 (Utah 1985).

Applying this standard to the facts in the case at bar reveals the court's error in failing to give defendant's mutual altercation instruction. Mr. Nelson himself testified that Ms. Fonnesbeck was kicking and hitting him on the back (T 122, 131).

Also, Mr. Nelson gave testimony that Ms. Fonnesbeck attempted to prevent him from taking his property from her apartment and that there was further struggling (T. 123). His testimony was corroborated to a certain extent by officer Young, who testified that upon his arrival, both Mr. Nelson and Ms. Fonnesbeck were engaged in an argument (T. 78). He also stated that it was his impression that both had been involved in the disagreement (T. 81), and that Ms. Fonnesbeck had been a participant in the fight (T. 82, 83).

The testimony of Ms. Fonnesbeck contradicts that of Mr. Nelson and officer Young on these particulars. However, the accused was entitled to an instruction on his theory as much as the city was on its theory where the facts were in dispute. The court usurped the function of the jury in weighing and discounting the evidence of Mr. Nelson's defense. The jury was pre-empted from evaluating the evidence in light of applicable law and reaching their own conclusions.

The court committed reversible error in declining to give Mr. Nelson's requested instruction regarding mutual combat. Error is prejudicial and requires reversal on appeal "unless it can be said beyond a reasonable doubt that the jury would have convicted even in the absence of error at the trial level." State v. Chapple, 660 P.2d 1208 (Ariz. 1983). In assessing whether error is reversible the crucial question is not whether there is substantial

evidence to support the judgment, but whether the error affected the judgment, United States v. Robinson, 544 P.2d 611 (2nd Cir. 1976). In State v. Pierre, 572 P.2d 1338 (Utah 1977), the Utah Supreme Court stressed that a court may reverse a conviction when the error at trial is such that:

> there exists a reasonable probability or liklihood that there would have been a result more favorable to the defendant in absence of the error. Id at 1352.

In the case at bar, there is a reasonable probability or liklihood that the result would have been more favorable to the defendant had the jury been instructed on the mutual combat theory. The court's refusal to instruct the jury was clearly reversible. There is certainly a reasonable likelihood that the result of the jury's deliberations as to the battery charge would have been more favorable to Mr. Nelson had the court allowed them to consider his defense. There is a reasonable liklihood that the jury would have acquitted Mr. Nelson of battery had they been instructed on, and had the defense been permitted to argue, the mutual altercation defense.

The trial court erred in refusing to instruct the jury on the mutual combat/consensual altercation defense. Appellant contends that this error mandates reversal by this Court.

CONCLUSION

On the grounds discussed above, Appellant seeks reversal of his conviction for Battery and remand of his case to the Circuit Court with an order for dismissal of the charge or for a new trial.

Respectfully submitted this 29 day of September, 1988.

DAVID P.S. MACK
Attorney for Appellant

CERTIFICATE OF SERVICE

I, DAVID P.S. MACK, hereby certify that four copies of the foregoing Appellant's brief will be delivered to he City Prosecutor's office, 451 South 200 East, Salt Lake City, Utah 84111, this 29 day of September, 1988.

DAVID P.S. MACK
Attorney for Appellant

Delivered by _____ this _____ day of September, 1988.

ADDENDUM A

Records Served @ B Block 3/4/88 - Transport.

SALT LAKE CITY,

A Municipal Corporation,

vs.

NELSON, JEFF T. 17659
DOB: 7/5/65
383 E 400 N #2

Bountiful, Ut or 8325 S 1100 E, Sandy, Utah

Defendant

B Block 243

SUMMONS Required

87101925

E

STATE OF UTAH } ss.

ATE OF UTAH TO the above name defendant. You are hereby commanded to be and appear before a Circuit rt Judge at 451 South 2nd East, Arraignment Court, in Salt Lake County, State of Utah, on or before the 18th day of March, A. D. 19 88, at the hour of 10 A.M. Don Carroll for.

NELSON

SERVED Jeff Nelson
THE 11 TO DEF.
PROCESS Summ
TIME ~~2:15~~ 1250
DATE ~~7-31-87~~ 3-4-88
ADDRESS ~~800 E 400 N~~ Jail Salt Lake
BY ~~Deputy Constable~~
DP CONSTABLE

nswer the CHARGE OF:

ATTERY: DEFENDANT USED UNLAWFUL FORCE OR VIOLENCE UPON THE PERSON OF OMPLAINANT, TO WIT; HE BEAT HER UP AND BROKE HER NOSE. ECTION 32-1-3.

ESTRUCTIONOF PROPERTY: DEFENDANT UNLAWFULLY DAMAGED PROPERTY BELONGING TO OMPLAINANT, TO WIT; HE BROKE SEVERAL PIECES OF FURNITURE AND MISCELLANEOUS OUSEHOLD ITEMS. SECTION 32-3-4.

OCATION APPROX: 1123 E 900 S

87 103708

olation of Section see above, Revised Ordinances of Salt Lake City,

pears from the complaint,

lissa Fonnsbeck on file in the Fifth Circuit Court Clerk's office, Salt Lake City, Department.

12/16/87

CIRCUIT COURT JUDGE

d this Summons on 3-4-88
Date

ADDENDUM B

THIRD JUDICIAL CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

SALT LAKE CITY Plaintiff	)	
VS	)	INDEX OF RECORD
JEFF T. NELSON Defendant	)	CASE No. 871011925MC 880416-CA

Salt Lake City
vs
Jeff T. Nelson
Case No. 871011925MC
880416-CA

8710119 25 mc

INSTRUCTION NO. _____

If the evidence shows beyond a reasonable doubt that Jeff Nelson was a party to any duel, mutual combat, or other consensual altercation, then you must find the defendant not guilty.